

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**UNITED ELECTRICAL CONTRACTORS  
ASSOCIATION, ET AL.**

**and**

**Case 29-CA-27928**

**LOCAL 3, INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL  
WORKERS, AFL-CIO**

**ORDER DENYING PETITION TO REVOKE SUBPOENAS<sup>1</sup>**

This matter is before the Board pursuant to the Building Industry Fund's petition to revoke investigative subpoenas ad testificandum A-819786 and A-819787, which were served on Frank Rappo and Joseph Pisarri, respectively, in their capacity as trustees for the Building Industry Fund,<sup>2</sup> by counsel for the Contempt Litigation and Compliance Branch on January 14, 2010. On January 21, 2010, the Petitioner filed a timely petition to revoke the subpoenas.

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<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

<sup>2</sup> The subpoenas at issue were also directed to Rappo and Pisarri in their capacity as directors of the Building Industry Electrical Contractors Association and trustees of the Building Trades Benefit Funds and Electricians Retirement Fund. No entity other than the Petitioner filed a petition to revoke the subpoenas.

The Petitioner argues, inter alia, that the subpoenas are void and unenforceable because the Board, absent a three-member quorum: (1) lacks authority to act, and (2) cannot issue subpoenas at the request of the General Counsel as a discovery mechanism to investigate possible contempt of court-enforced Board orders. We find no merit in these procedural arguments.

The Petitioner argues that the subpoenas involved in this case should be revoked because Chairman Liebman and Member Schaumber, acting as a quorum of the three-member group, do not have the authority to issue subpoenas. The argument that the two-member Board lacks the authority to act as a quorum of the National Labor Relations Board is without merit for the reasons stated above in footnote 1. Moreover, Sec. 11(1) of the Act provides that "[t]he Board, *or any member thereof*, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application." (Emphasis added). Thus, under the plain language of the Act, the issues raised by the Board's delegation of its powers to the two-member quorum are irrelevant to a determination of whether the Board continues to have the authority to issue subpoenas when it is comprised of two members. See *Expert Electric, Inc.*, 355 NLRB No. 12 (2010). Accordingly, the issuance of the subpoenas involved in this case was entirely proper and the Petitioner has failed to raise a meritorious procedural basis for revoking them.

Further, the Petitioner's argument that the Board cannot issue subpoenas at the request of the General Counsel in an investigation of possible contempt proceedings is also without merit. See *Expert Electric, Inc.*, *supra*. Section 3(d) of the Act grants the

General Counsel “final authority, on behalf of the Board,” with respect to investigative functions. The subpoenas were issued as part of an investigation concerning whether the General Counsel should initiate contempt proceedings. The Board’s “exclusive authority to institute contempt proceedings for violations of its orders...makes it in effect a prosecutor, obliged like other prosecutors to use its investigatory powers before instituting a judicial proceeding.....” *NLRB v. Interstate Material Corporation*, 930 F.2d 4, 6 (7<sup>th</sup> Cir. 1991), citing *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 15 (1<sup>st</sup> Cir. 1983). Accordingly, we find that the issuance of the subpoenas was entirely proper and the Petitioner has failed to raise a meritorious procedural basis for revoking them.

In addition, we find that the subpoenas seek information relevant to the matters under investigation, as required by Section 11(1) of the Act and Section 102.31(b) of the Board’s Rules and Regulations. Further, the Petitioner has failed to establish any other legal basis for revoking the subpoenas. See generally, *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9<sup>th</sup> Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4<sup>th</sup> Cir. 1996). See also *Link v. NLRB*, 330 F.2d 437, 439-440 (4<sup>th</sup> Cir. 1964) (NLRB has authority to issue investigative subpoenas to any person, including a third party, which may have information relevant to a matter under investigation in unfair labor practice proceedings); *NLRB v. The Bakersfield Californian*, 128 F.3d 1339, 1342 (9<sup>th</sup> Cir. 1997) (same). Accordingly, the petition is denied.

However, we condition our denial of the petition upon the General Counsel supplying each subpoenaed witness or the witnesses’ attorneys, as appropriate, with a copy of the underlying Board Order<sup>3</sup> and a general description of the matters

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<sup>3</sup> 347 NLRB 1 (2006).

concerning which he will be expected to testify.

Section 102.31(b) of the Board's Rules and Regulations states, in pertinent part, that the Board shall revoke a subpoena if in its opinion the subpoena "does not describe with sufficient particularity the evidence whose production is required." The testimonial subpoenas in this case identify, by name and number, the unfair labor practice case about which testimony is sought. Accordingly, under current Board law, they are sufficiently particularized. See *Offshore Mariners United*, 338 NLRB 745 (2002) (subpoena ad testificandum was not overly broad or vague where it identified unfair labor practice cases by name and number); *Postal Workers Local 64 (USPS)*, 340 NLRB 912 (2003).

However, a difference of opinion has arisen concerning whether *Offshore Mariners* and *Postal Workers Local 64 (USPS)* were correctly decided. Specifically, there is disagreement concerning (1) whether the particularity requirement of Section 102.31(b) of the Board's Rules and Regulations applies to a subpoena ad testificandum, and (2) if the particularity requirement does apply, whether a subpoena ad testificandum must describe the testimony sought, as well as identify the relevant unfair labor practice case by name and number. Without deciding these issues, we shall require the General Counsel to provide the subpoenaed witnesses or the witnesses' attorneys, as appropriate, with a copy of the underlying Board Order and a general description of the matters concerning which each will be expected to testify.<sup>4</sup> This would include, but shall not be limited to, information concerning communications the subpoenaed witnesses

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<sup>4</sup> Chairman Liebman would adhere to existing precedent on this issue. For institutional reasons, however, she joins her colleague in requiring the General Counsel to provide the subpoenaed witnesses with a copy of the underlying Board Order and a general description of the matters concerning which each will be expected to testify.

may have had with representatives of United Electrical Contractors Association concerning the Union's information requests, and if any of those communications occurred while the subpoenaed witnesses were acting in their capacities as trustees of the Building Industry Fund. This Order shall be nonprecedential.

Dated, Washington, D.C., March 23, 2010

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

(SEAL)

**NATIONAL LABOR RELATIONS BOARD**